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No. 74-1293

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CITY OF BLACK JACK, MISSOURI, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

INTEREST OF AMICUS CURIAE

This amicus curiae brief is being filed pursuant to Rule 42-4 of the Rules of the Supreme Court of the United States, by the City of Parma, Ohio, a political subdivision of the State of Ohio, and is sponsored by its City Solicitor, the authorized law officer thereof.

Parma is vitally interested in the outcome of this litigation because it also has been sued by the Attorney General under color

of 42 U.S.C. Section 3613. It sought to challenge the constitutionality of the Act of Congress relied on by the Attorney General by means of a counterclaim filed in the action pending against it, but the counterclaim was dismissed by the district court. An appeal from that order was filed in the Court of Appeals for the Sixth Circuit under 28 U.S.C. Section 1292 (a) (1), but was dismissed, and this Court denied certiorari on March 31, 1975.

The same jurisdictional and constitutional questions inhere in this litigation. Parma seeks to highlight these questions, which in its view are primary and fundamental, and to urge granting of certiorari so that these important issues can be resolved. It is of vital consequence to the Nation that an arm of the national government seeks to intrude upon and interfere with the reserved powers and authority of local governments. It seeks to do so under the guise of enforcing an Act of Congress which was intended to regulate the real-estate industry and not to violate the principles of federalism and separation of powers which are fundamental to our form of government.

ARGUMENT

Concept of Home Rule is Under Attack

Acting under color of 42 U.S.C. Section 3613, the Attorney General filed suit in the name of the United States of America against the little City of Black Jack, Missouri, asserting that by its enacting a comprehensive zoning ordinance, limiting new residential construction to single-family houses and making existing

apartments nonconforming uses, Black Jack allegedly violated the "Fair Housing" Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.).

However, Black Jack is not engaged in any aspect of the residential real-estate business, and so none of the prohibitions specified in 42 U.S.C. Section 3604 were violated by that municipality. It neither sells nor rents dwellings, nor finances their purchase, nor performs real-estate brokerage services, nor advertises dwellings for sale or rent, nor engages in "blockbusting". Nowhere in said section is it stated that enacting a comprehensive zoning ordinance limiting new construction to single-family houses is unlawful.

Black Jack is a municipal corporation -- a body politic exercising local governmental "home rule" powers, among which is the power to zone land within its territorial boundaries. Zoning land is the epitome of a local-governmental function, outside the ambit of powers delegated to the national government by the Constitution. As a matter of fact, the legislative branch of the national government has been delegated local-government authority only over the seat of the national government, the District of Columbia, by Article I, Section 8 of the Constitution. Even so, Congress has recently condescended to grant a measure of home rule to the residents of the district, who were not enthralled by any demonstrated superior ability of the national government to run a city. The thrust of the agitation for home rule was the innate desire of Americans, wherever they live, for home rule. "Please, big brother, we'd rather do it ourselves" is a theme not confined to television commercials.

Fundamental Issue of Jurisdiction

"At the outset it should be noted that the federal district courts are courts of limited jurisdiction. It is not their function to serve merely as a zoning appeal board. The individual merits of local zoning matters are appropriately left to the sound discretion of local zoning authorities." Rockbridge Associates, Ltd. v. Pruitt, 341 F. Supp. 703, 705 (N.D. Ga. 1971), aff'd en banc 491 F. 2d 5 (5th Cir. 1974), cert. den. sub. nom. South Gwinnett Venture, et al. v. Pruitt, 419 U.S. 837 (1974).

Jurisdiction is not a mere "peripheral" issue in the sense that it is "concerned with the comparatively superficial or not really essential aspects of the subject in question" (Random House Dictionary of the English Language, College Edition 988 (1968), as implied by the court of appeals (508 F. 2d 1179, 1183). Rather, it is of first importance, and "it is the duty of this court to see to it that the jurisdiction of the /district court/, which is defined and limited by statute, is not exceeded." City of Kenosha v. Bruno, 412 U.S. 507, 511 (1973).

It is desirable to investigate the jurisdictional basis for this action in greater depth than the superficial treatment accorded this fundamental question by the court of appeals. Thus, the thrust of this brief goes to the jurisdictional issue and not at this time to the deficit of reasoning of the court below.

A City Is Not a "Person" Amenable to the Act

42 U.S.C. Section 3602 (d) defines "Person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries." Nowhere in that comprehensive definition are states or municipal corporations mentioned. The definitions section clearly reveals that commercial entities and personal representatives, but not bodies politic, were to be amenable to the Act, along with individuals.

It is a general rule of statutory construction that governments, whether federal or State, and their subdivisions are not ordinarily considered within the purview of a statute, however general or comprehensive the language of the Act may be, unless the intention to include them is clearly manifest, as when they are expressly named therein or included by necessary implication.

"Neither the Government nor political subdivisions not included in the general wording of the statute are affected thereby unless it be clear and indisputable from the contents of the statute or that it be expressly included in the text of the statute before it would be subject to its terms." Wilcox v. City of Idaho Falls, 23 F. Supp. 626 (D.C. N.D. Idaho 1938).

Furthermore, the United States Code's general definitions section, 1 U.S.C. Section 1,

generally defines "person" to include "partnerships and corporations". Prior to the revision of that definitions statute in 1872, the term employed was bodies politic and corporate. The reason for the deliberate omission of the term "body politic" from said general definitions section was to make it clear that "'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession". See Reviser's Note, Vol. I, Rev. U.S. Stats. 1872, P. 19; Monroe v. Pape, 365 U.S. 167, 190 (N. 47) (1961). For this Court's ruling that a municipal corporation is not embraced within the term "person" employed in the Civil Rights Act of 1866, see City of Kenosha v. Bruno, supra.

Had the Congress intended to include States and municipalities within the ambit of 42 U.S.C. Section 3601 et seq., it would have specifically so provided. In common usage the term "person" does not include the sovereign or its political subdivisions, and statutes employing the term "person" will not ordinarily be construed to do so. "Congress made express provision, R.S. Section 1, 1 U.S.C. Section 1, for the term to extend to partnerships and corporations.... The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them." United States v. United Mine Workers of America, 330 U.S. 258, 275 (1947).

This Court expressed the desirability of judicial restraint in statutory construction in United States v. Cooper Corp., 312 U.S. 600, 605 (1940):

> "/W/e are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy to be served by the enactment, but, as well, by all available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.... our function ends with the endeavor to ascertain from the words used, construed in light of the relevant material, what was in fact the intent of Congress."

Congressional Debate on Civil Rights Act of 1968

There is not one iota of testimony before committees of the Congress considering "fair housing" legislation, or in the Congressional debate on the legislation actually passed by the 90th Congress, indicating that anyone intended the Act to apply to municipalities enacting zoning legislation or otherwise exercising home-rule powers.

When he introduced the fair housing title as an amendment to the Civil Rights Act pending before Congress on February 6, 1968, Senator Mondale had inserted into the Congressional Record, at Page 2272 of Vol. 114, questions and answers concerning it. The very first question asked "Who will be covered?"

The answer was that "The Act will cover brokers, property owners, managers, and anyone else who participates in the sale, rental, or financing of housing."

Senator Brooke of Massachusetts, a co-sponsor, stressed the limited purposes and ambit of the legislation:

> "Fair housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America." (Ibid. P. 2279)

Again, at pages 2282-2283, id., Senator Brooke re-emphasized the limited purpose of the legislation: "I think as the able Senator from Minnesota /Mondale/ well set forth in his opening statement, there will not be this great rush to the suburbs. There never has been. As people are educated and have the opportunity and wherewithal to move, they ought to be able to move. That is all the amendment would provide."

Not one proponent contested the articulate opponent, Senator Thurmond, when he pointed out, at Pages 2217-2218, that the legislation applied only to the private sector, and in no way involved local-governmental activity:

> The first concept to be kept in mind throughout any discussion of this title is that the subject sought to be regulated and the matter upon which it is proposed to legislate in this amendment is the private dealings between individuals. This amendment does not even purport to have any State involvement or involvement by any official person, or body of the State. The right to hold and enjoy property is a personal right which attaches to each and every individual in this country and under the laws and traditions established by the laws....what is sought to be controlled by this legislation is purely private action. (Id. pages 2217-2218).

From this very concise analysis of the wording and history of the Act, it is readily apparent that since neither Black Jack nor any other municipality is amenable to Title VIII of the Civil Rights Act of 1968, the Attorney General is without authority to bring this action, and a federal district court is without jurisdiction to hear it.

Suits to Interfere With Local Zoning Violate Federalism Principles

Even if Congress had attempted to make municipal corporations amenable to the Act and

to empower the Attorney General to bring suits against cities for enacting zoning ordinances, such attempt would be unconstitutional as violative of the principles of federalism, separation of powers, and home rule encompassed within the reserved rights recognized to exist by the Ninth and Tenth Amendments. The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent provisions of the Constitution under which the Court examines state action. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 44 (1973).

In Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971) this Court held that:

> "Due regard to the rightful independence of state governments, which should activate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which /a federal/ statute has defined."

Justice Black, in Karr v. Schmidt, 401 U.S. 1201, 1203 (1971) stated:

> "Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs."

CONCLUSION

Important questions of federal law are whether the Attorney General may intrude into the purely local matter of zoning, under the guise of enforcing the Fair Housing Title of the Civil Rights Act of 1968; whether by its terms said Act was intended to apply to municipal corporations, and if so whether such an application of the Act would be unconstitutional as violative of the principles of federalism, separation of powers, and of the reserved rights and powers inherent in the Ninth and Tenth Amendments to the Constitution of the United States. These questions have not been, but should be, settled by this Court. For this reason as well as those urged by Petitioner, amicus curiae respectfully urges that certiorari be granted.

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